Government of the Federation of Malaysia v Haji Ghani Gilong

HIGH COURT (KOTA KINABALU) — CIVIL SUIT NO K522 OF 1987
SYED AHMAD IDID J
16 DECEMBER 1992

Revenue Law *— Income Tax — Certificate signed by the acting assistant director — Validity — Income Tax Act 1967 ss 134, 136, 142(1), (2) — Interpretation Acts 1948 and 1967 s 93(2)*

Civil Procedure *— Summary judgment — Triable issues — Whether normal rules for triable issues applied — Whether there was finality of assessment — Income Tax Act 1967 s 106(3) — Rules of the High Court 1980 O 14*

Limitation *— Income Tax — Limitation does not apply to any proceedings by the government for recovery of tax — Whether claim statute-barred after 12 years — Limitation Act 1953 s 33(1) — Income Tax Act 1967 s 91*

The plaintiff's claim against the defendant was for income tax in the sum of RM522,935.22 for years of assessment 1970, 1982, 1983 and 1984 together with additional tax for years 1971, 1972 and 1973. The claim was filed on 30 March 1987 and an O 14 application for summary judgment was filed on 25 April 1988. At the hearing of the application, counsel for the defendant accepted that the defendant was liable to the extent of RM14,059.18 but raised the following defence:

(a) the certificate dated 10 August 1987 signed by the acting assistant director (pemangku penolong pengarah) was null and void and of no evidential value despite its issue under s 142(1) of the Income Tax Act 1967 ('the Act');
(b) the claim was premature as the defendant's appeal had not been dealt by the special commissioners and therefore it was unconstitutional by virtue of art 13(1) of the Federal Constitution; and
(c) the additional assessment for the year 1971 was raised only on 4 August 1984 which is more than 12 years and the claim was therefore time barred.

Held, allowing the application subject to a deduction of RM51,244.16 and granting a stay of execution until determination by the special commissioners of the defendant's appeal:

(1) The first issue was whether an 'acting' official came within the ambit of the Act and whether he or she could sign valid certificates under s 142(1) of the Act. Section 7 of the Interpretation Acts 1948 and 1967 states that 'a reference to the holder of any public office ... is a reference to the person lawfully holding, acting in or exercising the functions of that office' whilst s 93(2)

of the same Acts states that 'function' includes power and duty. On such authority, the court ruled that the certificate issued by the acting assistant director was valid.

(2) When proceedings were commenced under O 14 of the Rules of the High Court 1980, the normal rules for triable issues do not apply to income tax cases because of s 106(3) of the Act. The Act does not contemplate any finality of assessment as it is clearly required in s 103(1) that the moment the notice of assessment is served on the taxpayer, the tax becomes payable whether the taxpayer appeals against the amount or not. Therefore, when a taxpayer raises the constitutional issue that 'no person shall be deprived of property save in accordance with the law', the fact that he denies owing the additional tax cannot be a sufficient defence.

(3) By virtue of the proviso to s 33(1) of the Limitation Act 1953, limitation does not apply to the commencement of any proceedings by the government for the recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s 91 of the Act not made in any year of assessment or within 12 years after its expiration, the Inland Revenue Authority ('the IRA') would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment. If the assessment was made after 12 years, this could only be towards 'making good any loss of tax attributable to the fraud ...'. The IRA was not permitted, it seems from the tenor of the Act, to make an assessment after 12 years. The court accepted the defence that the additional assessment for 1971 of RM51,244.16 was statute-barred and accordingly such sum should be deducted from the total claimed.

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk cukai pendapatan berjumlah RM522,935.22 bagi tahun-tahun pentaksiran 1970, 1982, 1983 dan 1984 bersama cukai tambahan bagi tahun-tahun 1971, 1972 dan 1973. Tuntutan itu telah difailkan pada 30 Mac 1987 dan suatu permohonan A 14 untuk penghakiman terus telah difailkan pada 25 April 1988. Di pembicaraan permohonan itu, peguam bagi defendan menerima bahawa defendan bertanggungjawab pada setakat RM14,059.18 tetapi menimbulkan pembelaan berikut:

(a) surat akuan bertarikh 10 Ogos 1987 yang ditandatangani oleh pemangku penolong pengarah adalah terbatal dan tidak sah dan tidak mempunyai nilai pembuktian walaupun ia dikeluarkan di bawah s 142(1) Akta Cukai Pendapatan 1967 ('Akta itu');

(b) tuntutan itu dibuat pramasa kerana rayuan defendan masih belum diselesaikan oleh pesuruhjaya khas dan oleh kerana itu ia tidak berperlembagaan mengikut perkara 13(1) Perlembagaan Persekutuan; dan

(c) pentaksiran tambahan bagi tahun 1971 ditimbulkan hanya pada 4 Ogos 1984, iaitu lebih daripada 12 tahun dan oleh itu tuntutan itu dilarang had masa.

Diputuskan, membenarkan permohonan itu tertakluk pada tolakan RM51,244.61 dan memberikan penggantungan pelaksanaan sehingga rayuan defendan diputuskan oleh pesuruhjaya khas:

(1) Isu pertama adalah sama ada seorang pegawai pemangku termasuk dalam skop Akta itu dan sama ada dia boleh menandatangani surat akuan yang sah di bawah s 142(1) Akta itu. Seksyen 7 Akta Tafsiran 1948 dan 1967 menyatakan bahawa 'a reference to the holder of any public office ... is a reference to the person lawfully holding, acting in or exercising the functions of that office' sementara s 93(2) Akta yang sama menyatakan bahawa 'function' termasuk kuasa dan kewajipan. Atas autoriti seperti itu, mahkamah memutuskan bahawa surat akuan yang dikeluarkan oleh pemangku pengarah itu adalah sah.

(2) Apabila prosiding dimulakan di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980, kaedah biasa mengenai isu yang boleh dibicarakan tidak terpakai pada kes cukai pendapatan kerana s 106(3) Akta itu. Akta itu tidak bermaksud sebarang kemuktamadan taksiran seperti yang jelas dikehendaki dalam s 103(1) bahawa sebaik sahaja notis taksiran disampaikan kepada pembayar cukai, cukai itu kena dibayar sama ada pembayar cukai itu merayu terhadap amaun itu atau tidak. Oleh kerana itu, jika seseorang pembayar cukai menimbulkan isu berperlembagaan bahawa 'no person shall be deprived of property save in accordance with the law', fakta yang beliau menafikan berhutang cukai tambahan bukanlah pembelaan yang mencukupi.

(3) Mengikut proviso kepada s 33(1) Akta Had Masa 1953, had masa tidak terpakai pada permulaan apa-apa prosiding oleh kerajaan untuk mendapat kembali sebarang cukai atau faedah ke atasnya, walaupun untuk tujuan pentaksiran atau pentaksiran tambahan cukai di bawah s 91 Akta itu yang tidak dibuat pada sebarang tahun pentaksiran atau dalam masa 12 tahun selepas penyelesaiannya, pihak berkuasa hasil dalam negeri walau bagaimanapun mesti menunjukkan bahawa fraud atau keingkaran sengaja telah dilakukan atau bahawa sesiapapun telah cuai berhubungan dengan cukai bagi tahun pentaksiran yang berkenaan. Jika pentaksiran itu dibuat selepas 12 tahun, ini hanya digunakan untuk 'making good any loss of tax attributable to the fraud ...'. Pihak berkuasa hasil dalam negeri tidak dibenarkan, nampaknya daripada maksud Akta itu, untuk membuat suatu pentaksiran selepas 12 tahun berlalu. Mahkamah menerima pembelaan bahawa pentaksiran tambahan bagi tahun 1971 berjumlah RM51,244.16 dihalang oleh statut dan oleh kerana itu jumlah itu harus ditolak daripada jumlah yang dituntut.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 01–4–93.]

Notes

For cases on income tax, see 10 *Mallal's Digest* (4th Ed) paras 1460–1679.

For cases on triable issues in an application for summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2287–2293.

For a case on the limitation period with regard to proceeding by the government for recovery of tax, see 9 *Mallal's Digest* (4th Ed) para 1667.

Cases referred to

1 *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 (refd)
2 *Comptroller-General of Inland Revenue v NP* [1973] 1 MLJ 165 (refd)
3 *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276 (refd)
4 *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473 (folld)
5 *Government of Malaysia v Lin Ting Hsi* [1976] 2 MLJ 141 (refd)
6 *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 164 (refd)
7 *Government of Malaysia v Gan Chuan Lian and another action* [1992] 1 MLJ 449 (refd)
8 *Government of Malaysia v Ng Song Choon* [1975] 1 MLJ 131 (refd)
9 *Inland Revenue Commissioners v Ross and Coulter & Ors (Bladnoch Distillery Co Ltd)* [1948] 1 All ER 616 (refd)
10 *R v The Deputy Federal Commissioner of Taxation for South Australia, ex p Hooper L* (1926) 37 CLR 368 (refd)
11 *ABC v The Comptroller of Income Tax Singapore* [1959] MLJ 162 (refd)
12 *Wigens v Cook* 28 LJCP 312 (refd)

Legislation referred to

Income Tax Act 1967 ss 91, 103, 106, 134, 136, 142(1), (2)
Interpretation Acts 1948 and 1967 ss 7, 93(2)

Philip VK Lee (*Lee & Aziz*) for the defendant.
Mohamed Bazain bin Idris (Assistant Federal Counsel) for the plaintiff.

Syed Ahmad Idid J: The defendant was asked to settle his income tax in the sum of RM522,935.22 for years of assessment 1970, 1982, 1983 and 1984 together with additional tax for years 1971, 1972 and 1973. Puan Norlia bte Zainol, who issued a certificate on 10 August 1987 confirming the defendant's outstanding tax, signed as 'pemangku penolong pengarah' (or acting assistant director).

The claim was filed on 30 March 1987. Since then it has been brought up in court on 11 occasions. The action did not receive the attention it deserved despite the government of Malaysia filing the summons-in-cham-

bers way back on 25 April 1988. The defendant only filed his affidavit-in-opposition as late as 14 September 1991.

At the hearing on the O 14 application for summary judgment by the Inland Revenue on 11 November 1992, learned counsel accepted that the defendant was liable on and agreed to pay only RM14,059.18. Mr Philip Lee additionally raises three defences:

(1) the certificate signed by the 'acting' assistant director (exh B) is 'null and void and of no evidential value' despite its issue under s 142(1) of the Income Tax Act 1967 ('the Act');
(2) the claim is premature as the defendant's appeal has not been dealt with by the special commissioners and so it is unconstitutional by virtue of art 13(1) of the Federal Constitution; and
(3) the additional assessment for the year 1971 was raised only on 4 August 1984 which is more than 12 years (exh A-2) and the claim is therefore time-barred.

Does an official in 'acting' capacity have the full authority?

Is an 'acting' official within the ambit of the Act and can he/she sign valid certificates under s 142(1) of the Act? Section 142(1) mentions 'certificate signed by the Director-General' and s 142(2) states 'statement purporting to be signed by the Director-General or an authorised officer ...' It is only just and proper that courts construe words in statutes such as the Act which is penal in nature within the rule of strict construction. Section 136 on the delegation of the director-general's functions, makes it clear that the deputy director-general, the assistant director-general, the senior assistant and assistant director may exercise the functions of the director-general except those restricted specifically. By s 134, the 'care and management of the tax' is placed with the director-general of Inland Revenue and his staff are set out therein including 'such other officers as may be necessary and expedient for the administration of the Act' (s 134(2)(c)). Those 'such other officers' are, for all intents and purposes, vested with the full powers to act, to issue certificates and to compound offences. What about those in acting positions or capacity? Encik Bazain only quoted s 136. In law, there may be occasions when the answers or amplification may lie outside the Act. So indeed, both counsel were not helpful on this aspect. Actually, the answer stares at us from s 7 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) which states that a reference to the holder of any public office ... is a reference to the person for the time being lawfully holding, *acting* in or exercising the functions of that office. See also s 93(2) of the same Acts. In this respect, 'function' includes power and duty. On that authority, I rule that the certificate is valid.

Constitutional challenge

When a taxpayer raises the constitutional issue that 'no person shall be deprived of property save in accordance with the law', can the fact that he denies owing the additional tax assessed for the years 1971, 1972 and 1973

be a sufficient defence? This has been amply treated in *Arumugan Pillai v Government of Malaysia*[1] and *Comptroller-General of Inland Revenue v NP.*[2]

When proceedings are commenced under O 14, the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Act. Normally, when the defence raises triable issues, it is a rule of law that unconditional leave to defend should be given but under s 106(3) of the Act, it clearly states that in any proceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government, the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5). In this case, the director-general had exercised his powers under s 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within 30 days, further penalties were added and since that was not paid, civil proceedings were brought to recover the tax as a debt due to the government. Regarding payment of tax, s 103(1) reads:

> ... Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.

'It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that the amount the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.' per Arulanandom J in *Government of Malaysia v Abdul Rahman.*[3] This statement was agreed to and approved by the Supreme Court in *Chong Woo Yit v Government of Malaysia.*[4] But I am of the opinion that there can be a finality of assessment in these instances: (a) there is no valid notice of appeal against an assessment; (b) there is an agreement on the assessment; (c) an assessment has been determined on appeal and there is no right of further appeal; and (d) where the appellant (or taxpayer) dies and no personal representative applies to the special commissioners within two years of his death. In each of the above, the assessment made, agreed to or determined is final and conclusive (section 97).

However, *Government of Malaysia v Lin Ting Hsi*[5] held that:

> ...
> (2) the provision of s 103 is not confined only to one assessment or a composite assessment. The word 'assessment' is defined in s 2 of the 1967 Act to mean any assessment;
> (3) in the context of ss 103(1), 106(1), (3) and 143(1) of the Income Tax Act 1967 the word 'sufficient' in s 142(1) means that it is conclusive for the purpose of O 14 r 1.

This is relevant to today's proceedings. See *Sun Man Tobacco Co Ltd v Government of Malaysia*[6] in respect of the certificate under s 106.

Limitation

It was held in *Chong Woo Yit v Government of Malaysia*[4] that (at Held (1)):

> ... by virtue of the proviso to s 33(1) of the Limitation Act 1953, *limitation does not apply to the commencement of any proceedings* by the government for the recovery of any tax or interest thereon, although for the purposes of an assessment or additional assessment of tax under s 91 of the Income Tax Act 1967 *not made* in any year of assessment or *within 12 years* after its expiration, the Revenue would still have to show that fraud or wilful default has been committed or that any person has been negligent in connection with or in relation to tax for that year of assessment. (Emphasis added.)

This was cited in *Government of Malaysia v Gan Chuan Lian and another action.*[7]

I have considered the judgment in *Government of Malaysia v Ng Song Choon*[8] in respect of the taxpayer being allowed to raise the plea that the claim is statute-barred. The defendant in his statement of defence denies he is liable to any tax at all in respect of the 1971 additional assessment in the sum of RM51,244.16 since the notice of assessment was not issued and served within the time prescribed under s 91(1) of the Act. (Paragraph 5 of the statement of defence dated 23 June 1987.)

> 91(1) The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may *in that year or within twelve years after its expiration* make an assessment or additional assessment ... (Emphasis added.)

The time prescribed means '12 years'.

In support of the defendant's arguments are the judgments in *Government of Malaysia v Gan Chuan Lian and another action*[7] and *Chong Woo Yit.*[4] In the latter, the court held that the assessment (and the notice) must be issued within 12 years.

> Section 91(3) The Director General where it appears to him that —
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent; in connection with or in relation to tax, may *at any time* make an assessment in respect of that person for any year of assessment *for the purpose of making good any loss of tax* attributable to the fraud, wilful default or negligence in question. (Emphasis added.)

There is no proof or even an allegation of either wilful neglect or fraud on the part of the defendant in today's case. See also *Inland Revenue Commissioners v Ross and Coulter & Ors (Bladnoch Distillery Co Ltd)*[9] on this point.

It is evident from the law that if the assessment is made after 12 years, this can only be towards 'making good any loss of tax attributable to the fraud ...' The Inland Revenue Authority ('the IRA') is not permitted, it seems from the tenor of the Act, to make an assessment after 12 years. This makes perfect sense as otherwise, the IRA can strike at any taxpayer at any time on a never-ending spree ... and such limitation in the law makes it human and acceptable.

We have to distinguish between 'commencement of any proceedings', 'assessment', 'notice of assessment' and 'recovery' and their implications. Isaacs J in *R v The Deputy Federal Commissioner of Taxation for South Australia, ex p Hooper L*[10] says:

> An *assessment* is not a piece of paper: it is an official act or operation; it is the commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his known opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called a *'notice of assessment'* ... But neither the paper sent nor the notification it gives is the 'assessment'. That is and remains the act or operation of the commissioner. (Emphasis added.)

This was cited by Gunn Chit Tuan SCJ [as he then was] in *Chong Woo Yit v Government of Malaysia*[4] and by Buttrose J in *ABC v The Comptroller of Income Tax Singapore.*[11]

From the above statement of the law, *assessment* (see also s 2 of the Act) and *notice of assessment*, have been defined and explained. *Recovery*, however, succeeds when the tax leviable is paid either in full or to the extent as agreed by the director-general after negotiation with or request by the taxpayer. The word *recover* has a technical meaning in law whereby it signifies to recover by action and by the judgment of the court (see *Wigens v Cook*[12]). Proceeding is equivalent to 'any action' and civil proceedings may be begun by writ, originating summons, originating motion or petition (O 5 r 1 of the Rules of the High Court 1980). Tax due and payable may be recovered by civil proceedings as a debt due to the government — s 106(1). *Commencement of any proceedings* may take place at any time even after the 12-year period provided the lapse of time between assessment and legal action is reasonable and there is no laches or neglect by the IRA and that the IRA has not been dilatory in assessing and serving the notice of assessment.

I accept the defence that the additional assessment for 1971 of RM51,244.16 is statute-barred and accordingly, such sum should be deducted from the total claimed. As there is no sufficient cause to deny the other claims, I hereby grant an order in terms of the plaintiff's O 14 summons-in-chambers dated 25 April 1988 subject to the deduction of RM51,244.16.

The Supreme Court in *Chong Woo Yit v Government of Malaysia*[4] stated that 'as it was not due to any fault on the part of the taxpayer that his appeal to the special commissioners has still not been heard since 1985, in the exercise of our inherent jurisdiction we ordered a stay of execution until determination by the special commissioners of the taxpayer's appeal against the assessments raised against him.' (at p 475).

In the spirit of the Supreme Court's observations in *Chong Woo Yit*,[4] a stay of execution is hereby granted until determination by the special commissioners of the defendant's (taxpayer's) appeal against the assessment raised against him in this action.

Order accordingly.

Reported by Yap Foo Ken